

STATE OF MICHIGAN
COURT OF APPEALS

PATRICK NNANABU,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS, ADRIAN
CORRECTIONAL FACILITY and GUS
HARRISON CORRECTIONAL FACILITY,

Defendants-Appellees.

UNPUBLISHED

April 4, 2000

No. 211510

Lenawee Circuit Court

LC No. 95-006458 CL

Before: Zahra, P.J., and Saad and Gage, JJ.

PER CURIAM.

In 1995, plaintiff, a corrections employee, filed this action against his employer and the facilities where he was assigned, alleging racial discrimination, racial harassment and unlawful retaliation contrary to the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* Before discovery was completed, defendants moved for summary disposition regarding all of plaintiff's claims, which the trial court granted on January 3, 1996. In a prior appeal of this grant of summary disposition, this Court affirmed the dismissal of plaintiff's racial harassment and unlawful retaliation claims, but reversed and remanded plaintiff's claim for racial discrimination, finding "that there exist genuine issues of material fact regarding two of plaintiff's allegations." *Nnanabu v Michigan Dep't of Corrections*, unpublished opinion per curiam of the Court of Appeals, issued 3/21/97 (Docket No. 192877), slip op at 2. After discovery was completed on remand, defendants filed a second motion for summary disposition, which the trial court granted under MCR 2.116(C)(10). Plaintiff now appeals as of right this second order granting defendants summary disposition, and we affirm.

Plaintiff first contends that the trial court erred in interpreting this Court's prior decision as holding that summary disposition was inappropriate with respect to only two of plaintiff's allegations of racial discrimination and remanding for further proceedings concerning those two claims only, thus precluding consideration of plaintiff's remaining allegations of racial discrimination. This Court's prior decision states, in pertinent part, as follows:

Plaintiff, a black man, has alleged several instances of disparate treatment. We find that there exist genuine issues of material fact regarding *two* of plaintiff's allegations.

. . .

* * *

As to *both of these allegations*, plaintiff has presented documentary evidence upon which he may ultimately be able to establish disparate treatment, and thus a presumption of racial discrimination. . . . Accordingly, we reverse as to *these* claims and remand the case to the trial court. [*Nnanabu, supra* at 2-3 (emphasis added).]

We find it apparent in light of the above-emphasized clear and unambiguous language that the trial court correctly construed this Court's prior decision as holding that only two of plaintiff's allegations of racial discrimination survived defendant's first motion for summary disposition. Both the trial court and this Court are bound by this Court's prior decision, which remanded for further proceedings only with regard to the two allegations of racial discrimination discussed in the prior decision. *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997) (The law of the case doctrine provides that a ruling by an appellate court with regard to a particular issue binds the appellate court and all lower tribunals with respect to that issue.). Accordingly, plaintiff was not free to reargue the merits of his other allegations of discrimination, and we will not here reconsider them.

Plaintiff also challenges the trial court's summary dismissal of the two allegations of racial discrimination that survived defendants' first motion for summary disposition. This Court reviews de novo the trial court's summary disposition decision. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). Defendants moved for summary disposition under MCR 2.116(C)(10), which tests a claim's factual support. Summary disposition should be granted under this subrule if, except as to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). In ruling on a (C)(10) motion, the court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116(G)(5). A party faced with a motion for summary disposition brought under MCR 2.116(C)(10) is required when responding to the motion to present evidentiary proofs showing that a genuine issue of material fact exists for trial. If such proofs are not presented, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456, n 2; 597 NW2d 28 (1999).

Plaintiff's complaint and other allegations set forth a disparate treatment claim of racial discrimination. MCL 37.2202(1)(a); MSA 3.548(202)(1)(a) prohibits an employer from discriminating "against an individual with respect to employment . . . because of . . . race . . . [or] national origin." A prima facie case of disparate treatment race discrimination requires that the plaintiff prove that (1) he was a member of a class entitled to protection under the act, and (2) for the same or similar conduct he was treated differently than one who was a member of a different race. *Betty v Brooks & Perkins*, 446 Mich 270, 281; 521 NW2d 518 (1994). A disparate treatment claim involves intentional discrimination, which may be established through direct or indirect evidence. *Harrison v Olde Financial Corp*, 225 Mich App 601, 606; 572 NW2d 679 (1997). Because most discrimination

cases involve circumstantial or indirect evidence of discrimination, this Court has adopted the *McDonnell Douglas*¹ burden shifting analysis for evaluating these claims.² *Harrison, supra* at 606-607.

The establishment of a prima facie case under *McDonnell Douglas* requires only that the plaintiff produce enough evidence to create a rebuttable presumption of discrimination. This quantity of evidence need not constitute enough evidence for the case to be heard by a jury. Once the plaintiff meets this burden, the court must determine whether the defendant has articulated a legitimate, nondiscriminatory reason for its action. If the defendant provides such an articulation, then the court must consider whether the plaintiff has proven by a preponderance of the evidence that the reason offered by the defendant was a mere pretext for discrimination. *Harrison, supra* at 608. A plaintiff can establish that a defendant's articulated legitimate, nondiscriminatory reasons for its actions were merely a pretext for discrimination (1) by showing that the reasons had no basis in fact, (2) if the reasons have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if the articulated reasons were a factor in the defendant's decision, by showing that these reasons were insufficient to support the defendant's decision. *Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998).

In the instant case, assuming plaintiff's establishment of a prima facie claim of intentional discrimination, plaintiff failed to rebut the legitimate, nondiscriminatory reasons defendants articulated in explaining why plaintiff was assigned to perform officer's duties. Defendants established through the affidavit of Captain Kenneth Salisbury the existence of a policy under which sergeants with the least seniority and no permanent assignment were sometimes delegated to perform officer's duties when needed. Salisbury's affidavit further averred, and plaintiff's own deposition testimony agreed, that the applicable collective bargaining agreement covering sergeants permitted such substitution of duties. Defendants also produced documentary evidence illustrating that pursuant to this policy, other sergeants, including white sergeants, had been assigned to perform officer's duties during the same time period as plaintiff, and also before plaintiff was promoted to sergeant, just as frequently as plaintiff. Plaintiff failed to come forward with competent evidence refuting these legitimate and nondiscriminatory reasons for defendants' actions.³ Accordingly, we conclude that the trial court properly granted defendants summary disposition pursuant to MCR 2.116(C)(10) regarding these allegations.

With respect to the second incident of alleged discrimination, assuming that plaintiff's allegations gave rise to an inference of discrimination, defendants also established a legitimate, nondiscriminatory reason for not allowing plaintiff to leave his post as a segregation unit sergeant to attend a staff meeting. Specifically, defendants established, and plaintiff in his deposition testimony acknowledged, the existence of a policy that mandated that a sergeant remain on duty at all times in the segregation unit. Although plaintiff came forward with evidence in the form of his own deposition testimony that officers generally filled in for sergeants, including those in the segregation unit, thus permitting the sergeants to attend staff meetings, plaintiff failed to present any evidence that on the one occasion when he was told to remain within the segregation unit during a meeting an officer was available or offered to relieve plaintiff so that he could attend the specific meeting in question.⁴ Because plaintiff failed to rebut defendants' proffered legitimate, nondiscriminatory reason for directing plaintiff to remain within the

segregation unit during the staff meeting, we conclude that the trial court also properly granted defendants summary disposition of this claim pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Brian K. Zahra

/s/ Henry William Saad

/s/ Hilda R. Gage

¹ *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

² In cases where there is direct evidence of discrimination, the burden shifting approach is not appropriate. *Harrison, supra* at 609-610. Direct evidence of discrimination is evidence that if believed requires the conclusion that unlawful discrimination was at least a motivating factor in an adverse employment decision, e.g., use of racial slurs by a decisionmaker. *Id.* at 610. Plaintiff's discussion of alleged direct evidence of discrimination in his brief on appeal relates to the various other allegations of discrimination that the law of the case doctrine precludes us from reconsidering.

³ Plaintiff's conclusory characterization of defendants' proffered legitimate, nondiscriminatory reasons as false is insufficient to create a genuine issue of material fact. *Clark v Uniroyal Corp*, 119 Mich App 820, 826; 327 NW2d 372 (1982).

⁴ We further note that plaintiff failed to present evidence that it was more likely than not he in fact was denied attendance at the meeting on the basis of his race. Several times during his deposition plaintiff indicated that he had no idea why he was ordered to remain in the segregation unit during the staff meeting, when officers generally filled in for segregation unit sergeants during staff meetings. Plaintiff apparently did not inquire of his lieutenant whether someone could fill in for him during the meeting or of the reason why he could not attend. When plaintiff was asked regarding the extent of his knowledge whether he was excluded on the basis of his race, he responded, "I thought I was excluded because I'm black or there's something they want to say they don't want me to know. I mean, if not, I mean, why would I be excluded from the meeting?" Plaintiff did not support his supposition with specific facts as required to avoid summary disposition. *Detroit v General Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998) (Parties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact.); *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 362-363; 486 NW2d 361 (1992) (To avoid summary disposition of an employment discrimination claim a plaintiff must set forth specific facts that allow the inference that the defendant had a discriminatory reason that was more likely its true motivation or that the defendant's proffered reason was unworthy of credence.).